HAJI YAHYA BIN YUSOFF & ANOR. v. HASSAN BIN OTHMAN & ANOR.

[O.C.J. (Syed Othman J.) January 6, 1977]

[Johore Bahru — Originating Summons No. 85 of 1976]

Land Law — Wakaf land — Caveat — Caveat entered by beneficiaries of wakaf land — Application to remove caveat by administrators of estate — Wakaf Enactment (No. 5), ss. 4 & 5 — National Land Code, s. 323.

Wakaf Enactment (Johore) — Wakaf deed — Validity of — Wakaf Enactment (No. 5), ss. 4 & 5.

The applicants, administrators of the estate of Mohamed Salleh bin Perang (deceased) sought to remove the caveat entered by the respondents on a piece of land in Johore Bahru Town. On May 20, 1909 the deceased had settled two *wakaf* deeds over the land, one portion of the land to his son, Othman, the father of the first respondent and the other to his daughter, Kalthum, the mother of the second respondent. The deceased died on July 22, 1915. One of his sons, Suleiman, took out letters of administration and the *wakaf* land was registered in his name as representative. On Suleiman's death his brother Elias became representative and on Elias's death, the applicants took out letters of administration and the lands were registered in their names as representatives. The first applicant was also a grandson of the deceased but he was not the son of either Othman or Kalthum, the persons named in the *wakaf* deed. In entering the caveat the respondents claimed in effect that they had a better right to the title of the land than the applicants. The latter, on the other hand, contended that the *wakaf* was invalid and the land should form part of the estate of the deceased and should be distributed to all the beneficiaries including the respondents themselves.

Held, dismissing the application: the question of title of the land needed to be resolved. It would be only after a hearing under section 5 of the *Wakaf* Enactment that the court could determine whether the land should vest in the names of the beneficiaries of the *wakafs* or whether the *wakafs* were invalid, thereby reverting the land to the estate of the deceased.

Cases referred to:-

(1) *Fatuma binti Mohamed* v. *Mohamed bin Salim* [1952] A.C. 1.

(2) *Abdul Fata Mohamed Ishak* v. *Russomey Dhur Chowdry* (1894) 22 I.A. 76.

(3) *Commissioners of Religious Affairs & Ors.* v. *Tengku Mariam binti Tengku Sri Wa Raja & Anor.* [1970] 1 M.L.J. 222.

ORIGINATING SUMMONS.

Thara Singh for the applicants.

Ng Kong Yeam for the respondents.

Syed Othman J.: The applicants, administrators of the estate of Mohamed Salleh bin Perang (Dato Bentera Luar) deceased, seek to remove the caveat entered by the respondents on a piece of land, which is commonly known in Johore Bahru town as Kampong Encik Ami.

On May 20, 1909 Dato Bentera Luar, settled 2 wakaf deeds over the land: one portion of the land to his son Othman, father of the first respondent, and the other to his daughter, Kalthum, the mother of the second respondent. According to Encik Ng Kong Yeam, for the respondents, the *wakaf* deed in respect of the portion settled to Kalthum cannot be traced at the moment: it has been missing since the Japanese occupation. From the sketch plans in the many affidavits when the wakafs were created the total area of the land was given as 6 acres 0 rood 6 poles. For reasons which have not been made clear, the area has now dwindled to 4 acres 0 rood 30 poles. There is no doubt the land has now become a valuable piece of property, with all the surrounding lands having been fully developed and forming part of the expanding township of Johore Bahru.

A translation of the *wakaf* deed in respect of the portion settled for the son, Othman, produced in one of the affidavits reads:

"... Salutation in Arabic....

Whereas I, Mohamed Salleh bin Perang (Dato' Bentera Luar) while in sound state of mind and good health, have made a *wakaf* a piece of land with all the plants on it to my son Othman bin Mohamed Salleh and his children and grandchildren and descendants forever. The land is from a subdivision of my land Grant No. 166 dated 2nd day of Muharram, 1299 Hijrah, Johore Bahru.

The land is bounded on its west by Jalan Ngee Heng, on its north by former land of Dato' Hakim Haji Mohamed Salleh, on its south by former land of Encik Abu and on its east by the left bank of upper part of Sungei Segget as clearly shown in the plan annexed to this document.

As this is true and clear, I hereunder set my hand, in the presence of witnesses... (some words in Arabic.)"

The fact that there is a similar instrument for the portion to Kalthum is not disputed. The plan attached to the *wakaf* deed settled to Othman clearly shows that the portion to the west i.e. which lies between the upper part of Sungei Segget and Jalan Tebrau was settled to Kalthum.

Dato Bentera Luar died on July 22, 1915. One of his sons, Suleiman, took out letters of administration and the *wakaf* land was registered in his name as representative. On Suleiman's death, his brother, Elias, took out letters of Administration and on December 17, 1969 the land was registered in his name as representative. Elias died on April 11, 1973 and the applicants took out letters of administration and the lands are now registered in their names as representatives. The first applicant is also a grandson of Dato Bentera Luar, but he is a son of Yusoff and not of either Othman or Kalthum, the persons named in the *wakaf* deeds.

In entering the caveat the respondents claim in effect that they have a better right to the title of the land than the applicants.

Encik Thara Singh, for the applicants, submits that the *wakaf* is invalid and the land should form part of the estate of Dato Bentera Luar and should be distributed to all beneficiaries of the estate including the respondents themselves; he relies on cases which have been decided by the Privy Council and the Federal Court. He also says that when the respondents themselves applied for letters of administration, they named all the children of Dato Bentera Luar as beneficiaries, but this application was not pursued; and further section 4 of the *Wakaf* Enactment (Johore Enactment No. 5) has the effect of prohibiting this sort of *wakafs*.

Encik Ng Kong Yeam, for the respondents, argues that it is premature for the court to consider whether or not the *wakaf* is valid, as the question to be determined is whether the respondents have a caveatable interest, and as beneficiaries of the estate and by reason of the *wakaf* deeds and their relationship to the persons named in the *wakaf* deeds, it cannot be denied that they have such interest. He further says that the respondents did not pursue their application for letters

of administration on legal advice, as a new *wakaf* law is about to be brought into force; this new law (Enactment No. 11 of 1973) will repeal Enactment No. 5 and will affect the land.

I need only refer to the main authorities cited by the applicants' side. In *Fatuma binti Mohamed* v. *Mohamed bin Salim*,[1] an East African case, a Muslim in Kenya executed a *wakaf* deed of certain lands naming as beneficiaries his two daughters and their grandchildren from generation to generation and the deed further provided that on failure of the descendants, the *wakaf* properties should go to his nearest relatives, failing which to certain named mosques. The decision of the Privy Council, if I may summarise it, was that as there was no legislation dealing with such *wakafs* and on the interpretation of Islamic law, the Court of Appeal in East African was right in following the decision of the Privy Council relating to similar *wakaf* lands in India and to hold that such *wakaf* was invalid on the ground that it was a private *wakaf* and that the ultimate gifts to the mosques were illusory. (The Indian case referred to is *Abdul Fata Mohamed Ishak* v. *Russomey Dhur Chowdry*[2]).

In *Commissioner of Religious Affairs & Ors.* v. *Tengku Mariam binti Tengku Sri Wa Raja & Anor.*[3] the Federal Court held that Malaysian courts are bound to follow the decisions of the Privy Council. These are the passages of the judgment referred to.

Azmi L.P. after referring to Privy Council decision at page 223 said:

"The effect of the above would be that the Malaysian Courts would also be bound by the judgment of the Privy Council in *Abdul Fata's* case. Whether that state of affairs should continue or not is a matter for the legislature."

Suffian F.J. (as he then was) discussed the authorities fully and said at page 227:

"I now turn to the second question, namely, whether or not the *wakaf* was valid. I have examined the *wakaf* instrument and the authorities mentioned in the learned judge's judgment and those cited before us, and I am satisfied that the *wakaf* here was essentially for the benefit of Tengku Chik's family and that the gifts for the charity were illusory and that on the authority of the Privy Council decisions cited to us the learned judge was bound and we are bound to hold that the *wakaf* was therefore void, notwithstanding the Mufti's ruling to the contrary. This embarrassing situation can only be set right by legislation, as has been done in India and other places."

If I am not mistaken, the Privy Council in the decision referred to was dealing with *wakafs* according to its interpretation of Islamic law and not in reference to any special legislation dealing with *wakafs*. This is the reason for the remarks by Azmi L.P. and Suffian F.J. (as he then was). But in the present case, the situation is somewhat different. We have in Johore a special legislation dealing with *wakafs*, in the form of *Wakaf* Enactment (No. 5) which enacts the effects of *wakafs*, charitable or private. When Dato Bentera Luar declared the lands to be *wakaf* in 1909 the enactment was not yet in existence. Anyway, as far as I can see, the *wakaf* created is private as there is no ultimate gift to charity. The lands immediately after the creation of the *wakafs* might have been treated as *wakafs*. But when the enactment came into force on November 30, 1911, it had a retrospective effect. It affected lands which had already been declared *wakafs*. Section 4 reads:

"If, at any time prior to the commencement of this Enactment, any land shall have been declared to be *tanah wakaf* other than for some public or charitable purpose, the ownership thereof shall, as from the commencement of this Enactment, be deemed to vest exclusively in the person or persons beneficially entitled to the rent and profits thereof; and every such person shall, to an extent proportionate to his interest in such rents and profits, be deemed to have a permanent, transmissible and transferable right in such land."

By this provision the effect is that a private *wakaf* is deemed to vest exclusively in the person beneficially entitled to the rents and profits of the land and such person shall have a transmissible and transferable right in such land. In other words, it seems to mean that the person beneficially entitled becomes the owner of the land. In the present case, it would appear that Othman and Kalthum, the persons named in the *wakaf* instruments would be the persons beneficially entitled. But before a *wakaf* beneficiary can acquire such right, he (or his legal representative in the event of his death) must apply to the court for ratification of the title in the land office register as section 5 of the Enactment provides:

"(i) Any person claiming to be the owner, or part owner, of any land by virtue of the preceding section may at any time apply to the court for an order that any register, book or journal kept at any Land Office, or Registry of Deeds or Titles shall be rectified, or that an entry shall be made or interpolated in any such register, book or journal, or that any entry therein shall be cancelled.

(ii) Upon such application being made, the court shall cause notice thereof to be served, in the same manner as a summons in a civil suit, upon any person who may appear likely to be affected thereby, and such notice shall specify the time and place at which the application will be considered.

(iii) When the application is considered, the court shall hear every person who appears before it and claims to be affected by the application, and thereafter shall make such order as justice may require."

As the matter stands now, no application appears to have been made under section 5. The land from the death of Dato Bentera Luar has continued to be registered in the names of the representatives of Dato Bentera Luar.

Coming back to the question to be determined, for the applicants, it is contended that since the beneficiaries of the *wakaf* have done nothing for so long, the land should be declared to form the estate of Dato Bentera Luar for the benefit of all beneficiaries of that estate including the respondents. To this, I can only say that I doubt very much if I could ignore the *wakaf* deeds, and it should also be considered that the successive administrators themselves, did nothing about this title. As far as I remember when Encik Elias succeeded as administrator of the estate of Dato Bentera Luar, he, in 1971, applied to the court for an order to sell the land, and, if I remember correctly, it was pointed out to the solicitors appearing on his behalf that as the validity of the *wakaf* deeds did not appear to be disputed, the question of the title to the land should be resolved before the court could make any order. The matter was adjourned *sine die* and after sometime I heard Encik Elias had died.

From one of the affidavits in the present matter, the *wakaf* deed in respect of Othman was referred to the Religious Department and the Kathi Besar, Johore in his letter (3) dlm KBJ. 21/71 of August 11, 1976 gave the *Fatua* of the Mufti on the *wakaf*. Rendered in English it would read as follows:

"The land under Land Grant MG. No. 1072 Lot 883 has become *wakaf* valid according to Shariah. It has been settled by the *Wakif* (settler) the late Encik Mohamed Salleh bin Perang (Dato Bentera Luar, Johore) on his children Encik Othman bin Mohamed Salleh and Cik Kalthum binti Mohamed Salleh and on to their children, grand children and generations in perpetuity.

This type of *wakaf* on the construction of Shariah Law is called *Wakaf Khas Ahli* (special family *wakaf*)."

I do not think it would be proper at this stage to consider the effect of the *fatua* as against the statutory provision in Enactment No. 5.

I have cursorily gone through the new Johore Enactment (No. 11/73). I can understand why it has not yet been brought into force. There are some apparent defects. In the main it gives power to the Kathi to determine whether a property is a *wakaf*, but a right of appeal against his decision is also given. The definition provisions in section 2 give the meaning "*muku alaihi*" (the person or institution for whom the property is made a *wakaf*). But there is no reference to such *wakaf* in other provisions of the enactment. "*Nazir khas*" is defined to mean a person appointed by a *wakif* or *Nazir Am* to administer a *wakaf* property. But there seems to be no provision showing the circumstances under which a *Nazir Am* can appoint a *Nazir khas*.

The question of the title of the land clearly needs to be resolved. It would be only after a hearing under section 5 of the Enactment that the court could determine whether the land should vest in the names of the beneficiaries of the *wakafs* (or their representatives) or whether the *wakafs* were invalid, thereby reverting the land to the estate of Dato Bentera Luar.

For the purpose of the caveat, the contention of the respondents is that they have a superior claim to the title to the land by reason of their being the children of the beneficiaries of the *wakaf*, whereas the applicants are not. This is not disputed at all. Pending the decision of the court as to whether the land should remain as the estate of Dato Bentera Luar or should go to the estates of Othman and Kalthum, I am of the opinion the respondents' claim is within the purview of section 323 of the National Land Code.

Application dismissed with costs.

Application dismissed.

Solicitors: *Hassan Yunus & Co.; Hassan & Ng Kong Yeam.*

PUBLIC PROSECUTOR v. ABDUL AZIZ

[R.Cr.J. (Syed Agil Barakbah J.) February 5, 1978]

[Alor Star — Kedah Criminal Revision No. 2 of 1978]

Criminal Law and Procedure — Criminal Revision — Rukun Tetangga — Failure to attend to Rukun Tetangga duties without reasonable cause — Improper charges — Plea of guilt — Failure of magistrate to record facts of the case and conviction — Trial a nullity — Emergency (Essential Powers) Ordinance, 1969, ss. 31(1)(e), 44 — Essential (Community Self-Reliance) Regulations, 1975, regs. 31(1)(e) & 44 — Criminal Procedure Code (F.M.S. Cap. 6), s. 176.

Community Self-Reliance (Rukun Tetangga) — Failure to attend to Rukun Tetangga duties without reasonable cause — Emergency (Essential Powers) Ordinance, 1969, ss. 31(1)(e), 44 — Essential (Community Self-Reliance) Regulations, 1975, regs. 31(1)(e) & 44.

The accused was charged for failing to attend Rukun Tetangga duties without reasonable cause, an offence under section 31(1)(e), punishable under section 44 of the Emergency (Essential Powers) Ordinance, 1969. He pleaded guilty to all charges and was sentenced. All that was recorded after the charges were read and explained to the accused who understood the nature of the charge and the consequences of the plea were "Facts as per charge". Thereafter was the "plea in mitigation" before the sentence. The High Court called for the record and acted in revision.

Held, setting aside the sentence on all four charges: (1) the trial was a nullity. The accused had pleaded guilty to improper charges. He should have been charged for an offence under reg. 31(1)(e) of the Essential (Community Self-Reliance) Regulations, 1975 and punishable under reg. 44 of the same Regulations;

(2) the learned magistrate had failed to record the facts of the case which he should have done on a plea of guilty. This was necessary in order to ascertain whether the accused, especially if he was not represented by counsel, had understood the charge or charges preferred against him and that he really intended to plead guilty;

(3) the learned magistrate had failed to put on record a conviction against the accused in all the four charges.

Cases referred to:-

(1) *Supramaniam* v. *Kanthasamy* [1956] M.L.J. 18.

(2) *Tukiran bin Taib* v. *Public Prosecutor* [1955] M.L.J. 24 @ 25.

(3) *Palan* v. *Public Prosecutor* [1932] M.L.J. 124.

(4) *Public Prosecutor* v. *Nahat Singh* [1939] M.L.J. 239.

(5) *Public Prosecutor* v. *Chean Tin* [1939] M.L.J. 266.

(6) *Chin Ban Keat* v. *R.* [1949] M.L.J. 297.

CRIMINAL REVISION.

Syed Agil Barakbah J.: In this case, Abdul Aziz bin Fakir Mohamed was charged in the Magistrate's Court, Alor Star with four charges for failing to attend Rukun Tetangga duties without reasonable cause, an offence under section 31(1)(e), punishable under section 44, of the Emergency (Essential Powers) Ordinance, 1969. He pleaded guilty to all the charges and was sentenced to a fine of $50/-, in default to 5 days' imprisonment and imprisonment for one week on the first three charges and to a fine of $100/- and in default to one week's imprisonment and further imprisonment for one week on the fourth charge. As the case is the first of its kind in the State, it gained headline publicity in the press. So I called for the record to ascertain the propriety of the proceeding and the sentences imposed. The accused has also filed notice of appeal.

On perusal of the record, it is found that:—

1. All the four charges preferred against the accused are incomplete and vague.